2010

Daniel Van Beuge v. Draper City : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DANIEL VAN BEUGE,

Appellant,

vs.

DRAPER CITY,

Appellee

BRIEF OF APPELLEE

Appellate Case No. 20100212

ORAL ARGUMENT REQUESTED

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah

The Honorable William W. Barrett, District Court Judge

Trial Court Case No. 080907334

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I. STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to Utah Code Ann. § 78-4-103(2)(j).

II. ISSUES PRESENTED FOR REVIEW

Appellant Daniel Van Beuge ("Appellant") asserts that the only issue on appeal is whether the trial court correctly ruled that Appellant was a probationary employee of Appellee Draper City (the "City") when the City terminated his employment. *See* Appellant's Brief at 2-3. The City agrees that the ultimate issue to be resolved in this appeal is whether Appellant was a probationary or permanent employee at the time of Appellant's termination. The determination of this issue, however, is dependent on a consideration of the following four issues:

ISSUE 1: Based on Appellant's failure to comply with Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure, as well as his failure to dispute any of the facts upon which the City relied in its summary judgment motion, did the trial court correctly determine that there are no genuine issues of material fact?

ISSUE 2: Based on the undisputed facts, did the trial court correctly rule that a clerical error in a Personnel Action Form ("PAF") did **not** establish that Appellant was, in fact, a permanent, instead of a probationary, employee?

ISSUE 3: With respect to Appellant's argument that he became a permanent employee based on the City's failure to strictly comply with its policy

for extending Appellant's probationary period, has Appellant met his burden of proving that the policy in question is contractually binding on the City?

ISSUE 4: Even assuming, *arguendo*, that the policy in question was somehow binding on the City, do the undisputed facts establish that the City substantially complied with the policy, such that Appellant was a probationary employee at the time he was terminated?

III. DETERMINATIVE STATUTES AND RULES

Rule 7(c)(3)(A) and (B), Utah R. Civ. P.

Section 1010 of the Draper City Personnel Manual

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Appellant initiated this lawsuit by filing his Complaint on May 2, 2008. (R. at 1). In his Complaint, Appellant alleged only a single cause of action for declaratory judgment, wherein he asked the court to issue a declaratory order that Appellant was a "permanent employee" of the City, not a probationary employee, when he was terminated on March 12, 2008. (R. at 1-2). As alleged in his Complaint, Appellant claims that the City made him a permanent employee by means of a PAF that the City delivered to him in February 2008, which indicated that his employment status was "Permanent." (R. at 1-2).

On November 5, 2008, Appellant filed a summary judgment motion wherein he asked the Court to rule that he was a permanent employee of the City

as of February 11, 2008. (R. at 14). The City filed a memorandum in opposition to Appellant's summary judgment motion on December 8, 2008. (R. at 28-42). On March 16, 2009, the trial court denied Appellant's summary judgment motion on the grounds that, based on the record before it,[1] there were disputed issues of fact as to whether Appellant was a permanent employee or an at-will probationary employee when he was terminated. (R. at 46-47).

On December 11, 2009, after the parties had conducted discovery in the case, the City filed its motion for summary judgment. (R. at 88-89). The City filed a memorandum in support of this motion, together with numerous exhibits and several affidavits. (R. at 91-180). In its supporting memorandum, the City argued that the undisputed facts established: (1) that Appellant had numerous fundamental performance problems and was the subject of repeated disciplinary action throughout the time that he was employed by the City; (2) that Appellant was notified on at least two occasions that his probationary status was being extended; (3) that the indication of "Permanent" employee status in the February 2008 PAF was simply the result of a clerical error; (4) that Appellant knew his probation had been extended for six months; and (5) Every action the City took, other than the clerical error in the February 2008 PAF, was consistent with the fact that Appellant's probationary employee status had been extended, and the fact that

[1]At the time Appellant filed his summary judgment motion, no discovery had taken place in the case. After filing this lawsuit, Appellant did not schedule an attorneys' planning meeting report for many months and did nothing to pursue his lawsuit prior to filing his summary judgment motion. (R. at 49).

Appellant was a probationary employee at the time the City terminated his employment. (R. at 88-104).

Appellant filed his opposing memorandum to the City's summary judgment motion on January 4, 2008. (R. at 283-291). In his opposing memorandum, Appellant references an "Exhibit 1 hereof" and an "Exhibit 3 hereof" (R. at 284) but no such exhibits are attached to his opposing memorandum. (R. 283-291). In his opposing memorandum, as well as in his opening brief herein, Appellant references, quotes and relies on Section 3020 of the Draper City Personnel Manual (the "Manual"). (R. at 283-285; Appellant's Brief at 3, 8). Significantly, Section 3020 was never filed with the trial court, and was not attached in the Appendix to Appellant's Brief and, as a result, is not part of the record below.

In any event, as discussed in the City's summary judgment reply memorandum, Appellant's opposing memorandum failed to comply with Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure and Appellant also failed to dispute a single fact relied upon by the City in its summary judgment motion. (R. 283-295). Appellant did offer some additional facts in opposition to the City's summary judgment motion, but he failed to offer any citation to the record with respect to a number of these facts, and none of the additional facts for which citations were offered by Appellant were material. (R. 283-284, 293-294). Thus, the City argued that all the facts on which it relied are deemed admitted pursuant to Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure. (R. 292-293).

On February 5, 2010, the trial court granted the City's summary judgment motion by means of a Minute Entry, a copy of which is attached in the Addendum hereto. (R. 306-310). In its ruling, the trial court rejected Appellant's argument that the City's policies required that Appellant be given written notice that his probationary period was being extended and if no such notice was provided then Appellant became a permanent employee. (R. at 308). The trial court determined that, "based on the undisputed facts and the numerous uncontroverted documents submitted by" the City, it was clear that Appellant had been provided notice that his probationary status was being extended. (R. at 308-309). The trial court also stated that it "is not persuaded that the single PAF, which the plaintiff relies on, and which was clearly the result of a clerical error, provides any evidence that he was in fact a permanent instead of a probationary employee." (R. at 309). Finally, the trial court held "that there are no genuine issues of material fact and that Draper is entitled to Summary Judgment as a matter of law." (R. at 309).

Judgment was subsequently filed in favor of the City on February 18, 2010, and entered on February 22, 2010, and Appellant timely filed his Notice of Appeal on March 10, 2010.[2] (R. at 317-320).

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[2] As a preliminary note, the City points out that Appellant's Docketing Statement, which was filed on April 12, 2010, does not comply with Rule 9 of the Utah Rules of Appellate Procedure, because it fails: (1) to state the standard of review with supporting authority that the Court should use in reviewing his appeal; (2) does not set forth a statement of any of the issues Appellant intends to assert on appeal; (3) does not give citations to determinative statutes, rules or cases; (4) does not provide a succinct summary of facts material to a consideration of the issues

B. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

Appellant summarily asserts that there are no negative facts to marshal in his brief because all facts must be viewed in a light most favorable to him, as the losing party on the City's summary judgment motion. (*See* Appellant's Brief at 3). Appellant, however, does at least reference the following two significant facts which do not support his position in this appeal: (1) Sergeant Chad Carpenters' Performance Appraisal of Appellant, wherein he informed Appellant that he was recommending that Appellant's probation be extended; and (2) the Affidavit of Lieutenant Russell A. Adair who affirmed that he verbally informed Appellant of the City's decision to extend Appellant's probationary status for six months. (*See* Appellant's Brief at 3-4).

In his cavalier approach to the obligation to marshal the opposing evidence, Appellant does not even acknowledge, much less discuss, either his failure to dispute a single fact offered by the City in support of its summary judgment motion, or his failure to comply with Rule 7(c)(3)(B). These undisputed and uncontroverted facts are central to any resolution of this appeal, and they are summarized below.

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presented; and (5) fails to attach a single document regarding final judgment, or the rulings or findings from the trial court, even though those documents are in the record. Based on Appellant's failure to comply with Rule 9, the City submits that Appellant's appeal should be dismissed. *See C.M.C. Cassity, Inc. v. Aird*, 707 P.2d 1304, 1305 (Utah 1985).

Appellant began working as a probationary police officer for the City on or about October 23, 2006. (R. at 127). Pursuant to City policy, Appellant, as a hired police officer was subject to a twelve-month probationary period. (R. at 127, 129 at ¶ 5;).[3]

In January 2007, Appellant left the City during his shift and traveled to North Salt Lake, without first obtaining his supervisor's authorization. (R. at 133-137). The City subsequently investigated the matter and found that Appellant had violated numerous City polices and, as a result, Appellant received a verbal warning for leaving his assigned responsibility in the City without his supervisor's authorization, for failing to tell dispatch when he was enroute, for failing to know his location when he arrived, and for failing to provide dispatch with his location. (R. at 111-112, 133-137). In addition, Appellant received a written reprimand for failing to comply with a supervisor's directive. (R. at 111-112, 133-137).

In January 2007, Appellant also received a performance evaluation which indicated that he was a probationary employee, and which identified a number of areas where his work performance was unsatisfactory and needed improvement. (R. at 138-139). That same month, Appellant signed a written warning regarding his deficient report writing, wherein his supervisor criticized Appellant for not preparing a report when he should have and stated that there were "multiple" reports filed by Appellant that were missing information. (R. at 140-141).

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[3] The City's Police Department has its own policies. (R. 130 at ¶ 7). Police officers have a longer period of probation than other City employees. (R. 130 at ¶ 7).

Appellant's job performance problems continued. In June 2007, Appellant was copied on an email between his supervisors, which severely criticized Appellant's deficient performance with respect to making false statements regarding evidence and for improperly taking evidence home, and for, among other things, writing "the worst DUI report" his supervisor had ever seen. (R. at 142-143). Appellant's supervisor also wrote that, on June 6, 2007, Appellant was admonished (for the second time in ten days) to complete his work prior to going off duty and that Appellant had left work without finishing a report on a domestic violence case in which an arrest had been made. (R. at 142-143).

On July 6, 2007, and on August 21, 2007, Appellant received performance evaluations, both of which indicated that Appellant needed to improve his work performance, and which noted a number of specific incidents of unsatisfactory work performance. (R. at 144-148).

In late September 2007, Appellant received yet another performance evaluation which, in addition to showing that his employment status was probationary, also stated that he needed to improve his work performance and it again listed a number of specific incidents of his unsatisfactory work performance. (R. at 149-151). Significantly, in this evaluation, Appellant was expressly informed in writing, and orally, that although his probation was scheduled to end in October, his supervisor, Sergeant Chad Carpenter, had recommended that his probationary period be extended. (R. at 116, 149-151). Appellant signed and acknowledged this performance evaluation on September 28, 2007. (R. at 149).

That same week (the week of September 23, 2007), Lieutenant Adair met with Appellant and informed him that the City was extending Appellant's probation for six additional months due to performance issues.[4] (R. at 153, ¶ 3).

A few days later, on October 3, 2007, Lieutenant Adair sent the City's human resource director an email explaining that Appellant's probation was being extended "for an additional 6 months to see if we can correct his deficiencies during this period. . . . His current sergeant is aware of the situation and is working with him in an attempt to correct the problems." (R. at 154).

During Appellant's extended probationary period, Appellant had numerous additional incidents of performance problems and disciplinary actions where the City treated him as a probationary employee. On October 24, 2007, the City

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[4] In his brief, Appellant incorrectly asserts that this conversation actually took place on September 23, 2007. (*See* Appellant's Brief at 9). To the contrary, Lieutenant Adair only stated that it took place sometime during the week of September 23, 2007, which means it could have taken place at any time from September 23 to and including September 29, 2007. (R. at 152-153). Thus, Appellant is also incorrect in asserting that the conversation with Lieutenant Adair took place **before** Appellant signed the above-referenced performance evaluation acknowledging that Sergeant Chad Carpenter had informed him of Sergeant Carpenter's recommendation that Appellant's probationary status be extended. (*See* Appellant's Brief at 9-10). While Lieutenant Adair could not pin down exactly when during the week of September 23rd that he had his conversation with Appellant, it only makes sense that it was after the performance evaluation, *i.e.,* that Appellant's direct supervisor , Sergeant Carpenter, informed Appellant of his recommendation to extend Appellant's probation and, shortly thereafter, Lieutenant Adair orally informed Appellant that his probation was, in fact, being extended for an additional six months due to Appellant's numerous performance problems.

received a citizen complaint for the manner in which Appellant drove a City police car while he was off-duty. (R. at 155-157). An investigation ensued, the complaint was sustained, and Appellant was given a verbal reprimand. (R. at 155-157). In a December 6, 2007 email to Appellant's supervisor regarding the citizen complaint, Lieutenant Adair referenced Appellant's probationary status, by stating: "I have not entertained the violation of Policy for driving the vehicle off duty since that might lead to the charge of dishonesty during an IA [Internal Affairs] investigation which would end Van Beuge's probation." (R. at 158).

On January 10, 2008, Appellant received yet another verbal warning concerning his failure to properly complete his time card. (R. at 159; *cf.* R. at 160-161). Eight days later, on January 18, 2008, Appellant was dispatched on a residential burglary call. Instead of responding immediately, Appellant remained at a 7-Eleven store and continued to visit with other police officers. Appellant was cautioned that his response time of 41 minutes was unreasonable and that further delayed responses to calls for service could result in serious corrective action. (R. at 121, 162).

In the meantime, on or about January 29, 2008, Hazel Dunsmore, a City Human Resources Officer, was preparing several City PAFs. (R. at 130-132). At that time she had been employed by the City for approximately three months. (R. at 130-132). In preparing the PAFs, Ms. Dunsmore used a template and simply changed the name and some of the information on the PAFs. (R. at 130-132). On Appellant's PAF, she made a clerical error on the template and did not change the

Employee Job Status from "permanent" to "probationary." (R. 130-132). She had not checked Appellant's personnel file to determine whether his job status was permanent or probationary and she had not been told by anyone that Appellant's job status was permanent. (R. at 130-132). Furthermore, Ms. Dunsmore did not, and does not, have authority to change an employee's job status from probationary to permanent. (R. at 130-132).

When Appellant received the PAF with the clerical error, he made a copy of the document because he was concerned the City would say he was still a probationary employee. (R. at 119). Significantly, there is no evidence that anyone at the Police Department or the City told Appellant that he was no longer a probationary employee.

Appellant's work performance continued to be unsatisfactory, and that fact was documented in a performance evaluation prepared by Appellant's supervisor for the period of January 1, 2008 through February 29, 2008. (R. at 163-164). Significantly, this performance evaluation also indicated that Appellant's employment status was probationary. (R. at 163-164). Appellant's employment was terminated by the City on March 3, 2008. (R. 165). In addition, when Appellant was terminated, the City considered Appellant's employment status to be probationary. (R. at 129 at ¶ 8).

V. SUMMARY OF ARGUMENT

All of the facts relied upon by the City in its summary judgment motion are deemed admitted pursuant to Rule 7(c)(3)(A), both because Appellant's opposition

to the City's motion failed to comply with Rule 7(c)(3)(B), and because he failed to dispute any of the City's facts. Therefore, based on the record, the trial court correctly concluded that there were no material issues of disputed fact which would preclude the court from granting the City's motion.

In addition, the undisputed facts established that Appellant had numerous performance problems and was the subject of repeated disciplinary action throughout his employment with the City. As a result, the City determined to extend Appellant's probationary status for an additional period of six months. It is also undisputed that Appellant signed a written performance evaluation acknowledging that his Sergeant recommended that his probationary period be extended, and that he was informed by Lieutenant Adair that his probation was being extended for six months based on his performance problems. The undisputed facts further demonstrate that the City considered Appellant to be a probationary employee throughout his employment, as reflected in its internal communications and its subsequent performance evaluations of Appellant. Further, it is undisputed that the February 2008 PAF, which identified Appellant as a permanent employee, was the result of a clerical error by a person who simply forgot to change the form on which she was working, and that she had no authority to change the status of Appellant's employment. Finally, as the trial court correctly determined, it is undisputed that Appellant was fully aware that he was a probationary employee at the time he was terminated. Based on these undisputed facts, as well as the applicable law, the clerical error in the subject PAF did not

change Appellant's employment status from a probationary to a permanent employee.

In his appeal, Appellant has now abandoned his argument that the February 2008 PAF elevated him to the status of a permanent employee. Instead, he argues that, based on the City's failure to strictly comply with Section 3020 of the Manual in extending his probationary period, Appellant automatically became a permanent employee. This argument fails for two reasons. First, Appellant simply assumes that Section 3020 creates a contractually binding obligation on the City to follow it to the letter. It is Appellant's burden, however, to establish the existence of a contractual obligation on the part of the City, since he is the party seeking to enforce this alleged contractual obligation. Specifically, Appellant has failed to put an actual copy of Section 3020 of the Manual into the record, and he has also failed to establish that the Manual does not include a disclaimer to the effect that nothing in the Manual creates a contract. In fact, the Manual does include such a disclaimer. As a result, the record before this Court does not establish that Section 3020 is contractually binding on the City.

Regardless, even assuming *arguendo* that Section 3020 is somehow binding on the City, the undisputed facts establish that the City meets the substantial compliance rule articulated in *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1066 (Utah 1981). In other words, even if the City did not strictly comply with Section 3020, it **substantially complied** with it. Here, the undisputed facts establish that Appellant was informed on several occasions that his probationary

status was being extended (both in writing and orally), that it was being extended for six months, and that it was being extended due to various performance problems which were specifically identified in various performance evaluations and disciplinary actions. It is also undisputed that Appellant was fully aware that his probationary status had been extended. Thus, the purpose of Section 3020 was satisfied and the City substantially complied with the provision such that Appellant was, as the trial court found, a probationary employee when he was terminated.

VI. ARGUMENT

A. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.

The facts asserted in the City's supporting memorandum to its summary judgment motion were admitted as uncontroverted pursuant to Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure. Pursuant to Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure a memorandum opposing a motion for summary judgment must "contain a verbatim restatement of each of the moving party's facts that is controverted." The rule also requires that, for each disputed fact, the opposing party must provide "an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." If the opposing party does not controvert the movant's facts as required by Rule 7(c)(3)(B) then, pursuant to Rule 7(c)(3)(A), the uncontroverted facts are deemed admitted for purposes of summary judgment.

Appellant failed to controvert the eighteen separately numbered paragraphs in the City's initial summary judgment memorandum. In addition, Appellant's opposition memorandum did not include a verbatim restatement of the City's facts, nor did his memorandum provide a supported explanation for any grounds of any dispute. (R. at 283 to 291). As noted, both elements are required by Rule 7(c)(3)(B). Therefore, pursuant to Rule 7(c)(3)(A), the eighteen, uncontroverted fact paragraphs in the City's summary judgment memorandum are deemed admitted and do not create a genuine issue of material fact.

In addition, though Appellant's opposing memorandum did include a recitation of eight additional facts (as set forth in the "Undisputed Facts" section in Appellant's opposition memorandum), four of these fact paragraphs (specifically paragraphs 3-5 and 8) are not supported by any citations to evidence. (R. at 283, 284). Such "bare contentions, unsupported by any specifications of facts in support thereof, raise no material questions of fact." *Brigham Truck and Implement Co. v. Fridal*, 746, P.2d 1171, 1173 (Utah 1987), *citing Massey v. Utah Power & Light*, 609 P.2d 937 (Utah 1980). Thus, as unsupported contentions, the facts asserted by Appellant in said paragraphs 3-5 and 8 cannot give rise to a genuine issue of material fact.

Moreover, paragraph 6 cites to an Exhibit that was not attached to Appellant's opposing memorandum and is not part of the record before this Court.

Therefore, it cannot create a disputed issue of fact.[5] While the remaining three fact paragraphs 1, 2, and 7, are supported by citations to evidence, they obviously are not material facts.[6]

Considering the uncontroverted, admitted facts provided by the City, and Appellant's unsupported, immaterial, or undisputed facts, it is clear that Appellant failed to meet his burden, in responding to the City's summary judgment motion, that there is sufficient evidence to establish a genuine issue of disputed material fact. *See Orvis v. Johnson*, 2008 UT 2 ¶¶ 17- 18, 177 P.3d 600; Utah R. Civ. P. 56(c). Thus, in granting the City's summary judgment motion, the trial court correctly concluded that there were no genuine issues of disputed material facts. (R. at 309).

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[5] Regardless, even if considered, it is not material because the fact that Appellant may have received a positive employee evaluation during his time that his probationary period was extended does not overcome his subsequent and serious performance problems, nor does it establish that he was no longer a probationary employee.

[6] For example, Appellant's paragraph 1 claims that his employment with the City began on October 16, 2006. (R. at 283). Though the City asserted that his employment began on October 23, 2006 (R. at 93), the difference in the hire date is not material, as the trial court correctly concluded in its ruling. (R. at 306). Similarly, the evidence that Appellant cites in support of paragraph 2 does not support his assertion that "all" employees are required to complete a one year probationary period; rather, it only stands for the proposition that persons hired as City police officers are required to complete a one-year probationary period. (R at 93, 283). This is precisely consistent with the City's assertion and, therefore, there is no dispute. Finally, the statement in paragraph 7 is not material as it simply stands for the proposition that Appellant's employment was terminated on March 3, 2008. (R. at 284).

B. THE TRIAL COURT CORRECTLY DETERMINED THAT THE CLERICAL ERROR IN THE SUBJECT PAF DID NOT MAKE APPELLANT A PERMANENT EMPLOYEE.

As alleged in his Complaint, Appellant relied on the clerical error in the February 2008 PAF as the basis for his argument that he was a permanent employee at the time of his termination. (R. at 1-2). The trial court, however, correctly concluded that the February 2008 PAF was insufficient to elevate Appellant to a permanent employee, based on the undisputed facts and the applicable law. (R. at 308-309). The undisputed facts which support the Court's decision include the following.

First, it is undisputed that Appellant received repeated criticisms of his work performance during the first year of his employment. (R. at 108-114, 133-146). In September 2007, near the end of his first year of employment, Appellant's supervisor, Sergeant Carpenter, recommended in writing that Appellant's probation be extended due to work performance problems. (R. at 151). Appellant admits that he received and signed that document, and that the extension of his probation was discussed with him. (R. at 115-116).

During the week of September 23, 2007, Appellant also met with Lieutenant Adair and, instead of terminating his employment, Lieutenant Adair told Appellant that his probation was being extended for six months due to work performance issues. (R. at 153 at ¶ 3). Consistent with what was stated during that meeting, Lieutenant Adair sent the Human Resource Department an email stating that Appellant's probation was being extended six months and that Appellant's

sergeant was aware of the situation and was working with Appellant to improve his performance. (R. at 154).

The undisputed facts also establish that the City considered Appellant to be a probationary employee because, a few months later, in an email discussing a citizen complaint about Appellant, Lieutenant Adair referenced Appellant's probationary status. (R. at 158). Moreover, Appellant's supervisor prepared a performance evaluation for the period of January 1, 2008, to February 29, 2008, which in addition to documenting that Appellant's work performance continued to be unsatisfactory, indicated that Appellant's employment status was probationary. (R. at 158). Also, Appellant testified that the City told him, both when he was relieved of duty and when he was terminated, that it was because his "probation wasn't working out." (R. at 123).

Not only did the City always consider Appellant to be a probationary employee, the evidence shows that Appellant, himself, also knew he was a probationary employee. For instance, Appellant testified that when he received the February 2008 PAF with the wrong box checked (indicating he was a permanent employee), he made a copy of the PAF because he was concerned the City would tell him he was still a probationary employee. (R. at 119). He admitted the reason he thought the City may tell him that he was still on probation

was because his supervisors continued to be critical of his work performance. (R. at 117-119).[7]

Finally, there is one additional fact that shows that Appellant knew he was still a probationary employee on the date he was terminated. At the end of February 2008, when he was told by two sergeants that he was being relieved of duty because he failed to successfully complete his probationary period, Appellant did not contest their assertion that he was a probationary employee. (R. at 122-123).

In sum, the undisputed evidence established that: (1) throughout Appellant's employment the City considered him to be a probationary employee; (2) Appellant knew that his probation had been extended for six months; (3) Appellant continued to receive criticisms and warnings about his work performance during the extended probationary period; (4) Appellant made a copy of the PAF that showed his status as permanent because he was concerned that the City may say that he

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[7] For example, his supervisor gave him a verbal warning for leaving the City before the end of his work shift and, instead of turning around and returning to the City, he continued home. (R. at 120, 166). Appellant also received a verbal warning for unreasonably delaying his response to a residential burglary because he wanted to stay and visit with other officers at a 7- Eleven store. (R. at 121, 162). His supervisor also prepared other documents identifying deficiencies in his work performance. (R. at 167) (documenting a verbal warning for leaving his assigned work area, (R. at 168) (documenting a verbal warning for failing to follow policy with respect to having a driver leave his vehicle in an unsecured location).

was still a probationary employee. Also, it is undisputed that no one told Appellant that he was no longer a probationary employee.

Based on the foregoing record, Appellant's assertion that he was a permanent employee simply because there was a box marked "Permanent" on his February 2008 PAF, is without merit. Once again, the undisputed evidence establishes that: (1) the box was marked permanent due to an inadvertent, clerical error; (2) the person who prepared the PAF, Ms. Dunsmore, had been employed by the City for only three months and, when she prepared the PAF she used a template and she made a clerical error by not changing Appellant's employee job status box on the template she was using from "permanent" to "probationary;" (3) Ms. Dunsmore had not checked Appellant's personnel file to determine whether his job status was permanent or probationary and that she was not told by anyone at the City that Appellant's job status was permanent; and (4) Ms. Dunsmore did not have authority to change an employee's job status from probationary to permanent. (R. at 130).

Obviously, a determination that an inadvertent clerical error is sufficient to change an employee's employment status creates an unfortunate precedent that would have far reaching, and undesirable consequences. The City's counsel is not aware of a single case where a court has ruled in a manner that would support Appellant's position here. To the contrary, courts generally do not allow a party to benefit from inadvertent, harmless clerical errors. *Cf.* Utah R. Civ. P. 60(a) (providing for corrections to clerical errors in judgments). For example, in a civil

rights action brought by Muslim inmates to allow inmates to use Muslim names, the plaintiffs were unsuccessful, in part, because the use of an inmate's given name, rather than Muslim name, was due to a clerical error. *See Masjid Muhammad-DDC v. Keve*, 538 F.Supp.2d 720, 723 (D. Del. 2008). In another case, the court held that a retirement plan could recover overpayments that were made to a widow due to clerical error. *See Blanck v. Consolidated Edison Retirement*, No. 02-Civ-7718, 2004 WL 115199 at *8 (S.D.N.Y. Jan. 26, 2004) (R. at 169-177). In *Pipoly v. Premier Parks, Inc.*, a civil rights action, the court held that a clerical error in recording an officer's commission did not preclude a finding that the officer was acting under color of state law. No. 00-3616, 2001 WL 1006142 at * 2 (6th Cir. 2001) (R. at 178-180). Likewise, in *Krutchkoff v. Fleet Bank*, 960 F.Supp. 541, 551 (D. Conn. 1996), the court held that a bank did not waive its right to collect the actual balance of a loan (plus interest, attorney's fees and court costs), even though, due to a clerical error, the amount owed on the loan had been misstated in a letter by the bank. Finally, the court in *Cope v. McPherson*, 594 F.Supp. 171, 176 (D. D.C. 1984), stated that the denial of a promotion resulting from a clerical error would not establish an age discrimination claim.

Based on the foregoing legal authority, the trial court correctly concluded that the clerical error in the February 2008 PAF is insufficient as a matter of law to change Appellant's employment status from probationary to permanent.

C. APPELLANT'S ARGUMENT THAT HE BECAME A "PERMANENT" EMPLOYEE BASED ON THE CITY'S FAILURE TO STRICTLY COMPLY WITH SECTION 3020 OF THE MANUAL IS WITHOUT MERIT.

On appeal, Appellant has apparently abandoned his argument that he became a permanent employee based on the February 2008 PAF. Instead, Appellant now argues that the provisions in Section 3020 of the Manual created an implied-in-fact-contract. Under the theory asserted in his brief, Appellant argues that the City had to strictly comply with the language of Section 3020 if it was going to extend Appellant's probationary status. Appellant, however, fails to meet his burden of proof for establishing that Section 3020 gives rise to an implied-in-fact agreement that is contractually binding on the City. Even assuming the existence of such an implied-in-fact contract, however, Appellant's argument fails based on the "substantial compliance rule," pursuant to *Piacitelli v. Southern Utah State College*, 636 P.2d 1063, 1066 (Utah 1981).

1. Appellant Fails To Meet His Burden Of Establishing That The City Is Contractually Bound To Strictly Comply With Section 3020 Of The Manual.

The argument now asserted in Appellant's brief is based on his assertion that a contractual obligation arises from the probation extension policy in Section 3020 of the Manual. Appellant, however, fails to carry his burden of establishing the existence of any such contractual obligations. It is well settled that "[t]he burden of proving the existence of a contract is on the party seeking enforcement of it." *Oberhansly v. Earle*, 572 P.2d 1384, 1386 (Utah 1997).

Instead of even trying to satisfy his burden on this issue, Appellant merely assumes the existence of a contract by asserting that "employees are entitled to rely on those rules" that "public bodies" promulgate for themselves. (Appellant's Brief at 8). It is significant, however, that, though Appellant quotes Section 3020 in his brief, he does not cite to anything in the record for his quotation. (*See id.*). That is because Appellant failed to put Section 3020 into the record. As a result, he cannot rely on it. *Phillips v. Hatfield*, 904 P.2d 1108, 1109 (Utah App. 1995.

Appellant failed to carry his burden in this regard for another reason. Under Utah law, courts can construe a municipality's personnel manuals as part of an employment contract. *See Canfied v. Layton City*, 2005 UT, ¶ 16, 122 P.3d 622 (*citing Piacitelli*, 636 P.2d 1063, 1066); *Cabaness v. Thomas et al.*, 2010 UT 23, ¶ 58, 232 P.3d 486. As the Utah Supreme Court noted in *Cabaness*, however, municipal employers may avoid contractual liability by including clear and conspicuous disclaimer language in their manuals. *Id.* at ¶ 60 n. 9. For example, "a clear and conspicuous disclaimer, as a matter of law, prevents employee manuals or other like material from being considered as implied-in-fact contract terms." *Id.* at ¶ 58 (*quoting Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1003 (Utah 1999)). Thus, to the extent that the Manual contains the appropriate disclaimer language, Section 3020 is not contractually binding on the City. Appellant has not put the Manual into the record, therefore he has not established that the Manual does not include the relevant disclaimer language and, as a result, he has not proven that Section 3020 is binding on the City.

In light of the foregoing precedent that disclaimers obviate contractual obligations, Appellant had to show initially that the Manual does not include any such disclaimer language if he is going to prevail on his argument that Section 3020 of the Manual creates a binding obligation on the part of the City. Appellant, however, has made no such showing here. Most importantly, Appellant cannot make any such showing because the Manual **does**, in fact, include a disclaimer. Specifically, the opening Introduction Section of the Manual expressly states as follows: "The information contained herein and any amendments or alterations hereto do not constitute a contract or agreement of any kind between the City and its employees." Section 1010 of the Manual, a copy of which is attached in the Addendum hereto.[8]

In sum, inasmuch as Appellant has failed to demonstrate that the Manual lacks a disclaimer, and in light of the fact that the Manual does, in fact, contain a disclaimer, Appellant fails to carry his burden to demonstrate the existence of a contract. *Oberhansly*, 572 P.2d 1384, 1386, *see also Cabaness*, 2010 Ut. 23, ¶ 58. Thus, Appellant's entire argument regarding Section 3020 fails.

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[8] Of course the City recognizes that the quoted provision from Section 1010 is also not part of the record below. The disclaimer language of the Manual was not previously included in the record as it was not necessary to refute the former focus of Appellant's argument. The City only provides it now so that the Court is fully aware of the facts in the event the Court decides to consider Section 3020 and Appellant's argument thereto, despite the fact that Section 3020 is also not in the record.

2. Assuming, *Arguendo*, That The Manual Gives Rise To A Contractual Obligation, The Undisputed Facts Establish That The City Substantially Complied With Section 3020.

Regardless, even if the Court concludes that Section 3020 is somehow binding on the City, the undisputed facts establish that the City "substantially complied" with Section 3020, based on *Piacitelli*, *supra,* 636 P.2d 1063, 1066 (Utah 1981). According to the probationary extension policy of section 3020:

> upon the recommendation of the supervisor and approval of Department Head and the City Manager, the Probationary Employment Period may be extended when the original period is not adequate for the satisfactory assessment of an employee's performance. In such event, the employee will receive written notification of the reason for and the length of the extension.

Relying upon the language discussing the written notification, Appellant argues that he was never "provided Written Notice of the reason for and length of any extension." (Appellant's Brief at 9). Appellant also claims that the written notice of extended probation provided in Appellant's performance evaluation, (R. at 149-151), does not comply according to Appellant because the reason for and the term of the extension were provided orally. *See id.* Appellant also mentions a lack of an averment that the City Manager approved of the extension. *Id.* Without strict compliance with these requirements, Appellant argues his probationary status cannot be extended, since public "employees are entitled to rely on those rules" which public bodies set for themselves. (Appellant's Brief at 9).

In support of this argument, indeed as the only case provided in the body of his argument, Appellant cites *Lucas v. Murray City Civil Service Commission* 949

P.2d 746, 754 (Ut. App. 1997). (*See* Appellant's Brief at 8). *Lucas*, however, is a case dealing with due process rights under the 14th Amendment arising from a statutorily created property interest in continued employment. Appellant has not asserted a due process claim; his only claim is one for declaratory judgment that sounds in contract law.

The court in *Lucas*, however, specifically distinguishes cases where "no property interest exists," and "the employee must rely solely upon any procedural protections afforded by contract . . ." from due process cases. *Lucus*, 949 P.2d 746, 752. Of course, this case is one where Appellant is relying on a contract theory as the basis of his claim for declaratory judgment.

In any event, *Piacitelli* disposes of Appellant's argument. *Piacitelli* is widely cited for what is referred to as the "substantial compliance rule." *Zadaggar v. Zale Corp.*, 856 F.2d 1473, 1477 (10th Cir. 1988). *See also*, *Yarcheski v. Reiner*, 669 N.W. 2d 487, 495 (S.D. 2003) (Supreme Court of South Dakota adopting the rule) *and Hom v. State*, 459 N.W. 2d 823, 824 (N.D. 1999) (Supreme Court of North Dakota adopting the rule). Appellant would have the Court ignore the written recommendation to extend Appellant's probation in the performance evaluation which he signed, (R. at 149-151), the verbal notice from Lieutenant Adair with an explanation of the performance based reasoning and the extension term of six months (R. at 35), as well as other important and relevant facts. Instead, Appellant would have the Court blindly impose a requirement of strict compliance with Section 3020, despite the undisputed fact that Appellant was

actually and fully aware that his probationary period had been continued for a six-month period. Such a standard of strict compliance is simply inconsistent with the substantial compliance rule articulated in *Piacitelli.*

According to the substantial compliance rule, acts in substantial compliance are sufficient where "the purpose of the procedural requirements [is] fulfilled and the substantial interests of the parties [are] satisfied." *Piacitelli*, 636 P.2d 1063, 1066. In *Stensrud v. Mayville*, the relevant personnel manual included regulations of the State Board of Higher Education which required a written notice of termination. 368 N.W. 2d 519, 522 (N.D. 1985). Citing *Piacitelli*, however, the court found substantial compliance absent such a written notice after determining that "the purpose" behind the regulation was "to ensure receipt of notice from the responsible person." *Id.* Interestingly, the personnel manual in *Piacitelli* also required "written warning," but the absence of such a warning did not preclude a holding of substantial compliance. 636 P.2d 1063, 1065-66. The written performance evaluation signed by Appellant, (R. at 149-151), the verbal notice from Lieutenant Adair (R. at 35), among other facts, "ensure receipt of notice from the responsible person." *Stensrud*, 368 N.W. 2d 519, 522.

The best explanation for the purpose behind the requirement for approval of a superior's recommendation for probationary extension by the Department Head and City Manager is to protect an employee's interests against unilateral decisions, and to ensure that the employee receives notice of the extension, as well as of the length and basis for the extension. In the present case, not only Appellant's

supervisor, Sergeant Carpenter, but Lieutenant Adair, and the Police Chief (Department Head) approved of the extension. (R. at 87, 129). Indeed, despite a clerical mistake on the PAF, each of the City's interactions with Appellant are consistent with the obvious understanding that Appellant was a probationary employee. Moreover, the fact that Appellant continued as a probationary employee for several months after the initial one-year probationary term suggest, at a minimum, approval of the probationary extension by the City Manager, and Appellant has not demonstrated otherwise. Finally, as discussed above, it is undisputed that Appellant was aware of the extension, as well as the period of the extension and the reasons why the probation was extended.

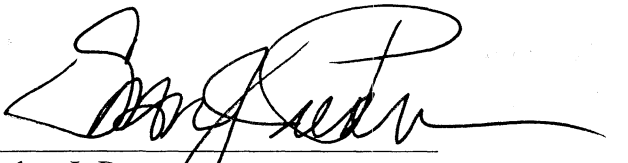
It is also significant that, in professions where public safety is an issue, the determination of supervisors is given heightened deference in deciding whether substantial compliance exists. *Don Houston, M.D., Inc. v. Intermountain Health Care, Inc.*, 933 P.2d 403, 405-408 (Utah App. 1997). Law enforcement is such a profession. Thus, having satisfied the purposes and interests behind the Section 3020, the City is in substantial compliance even assuming the existence of a contractual obligation that Appellant has neither established nor proven.

VII. CONCLUSION

Based on the foregoing, the City respectfully submits that the trial court's decision to grant the City's summary judgment motion against Appellant should be affirmed.

DATED this 20th day of September, 2010.

PRESTON & SCOTT

By: 

Stanley J. Preston
Bryan M. Scott
Stephen J. Preston
Attorneys for Appellee Draper City

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2009, I caused two (2) true and correct copies of the **BRIEF OF APPELLEE** to be mailed by first class United States Mail, postage prepaid, to the following:

JERRALD D. CONDER
341 South Main Street, Suite 406
Salt Lake City, Utah 84111
Attorney for Appellant Daniel Van Beuge

ADDENDUM

February 5, 2010 Third District Court Minute Entry Granting Summary Judgment to Appellee Draper City

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DANIEL VAN BEUGE,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 080907344
vs.	:	
DRAPER CITY, a body politic,	:	
Defendant.	:	

The Court has before it a request for decision filed by the defendant seeking a ruling on its Motion for Summary Judgment. The Court notes that the parties have requested oral argument on the defendant's Motion. However, since the parties' written submissions adequately apprise the Court of their respective legal positions, the Court declines to schedule this matter for hearing and will instead rule as stated herein.

As factual background, the plaintiff in this case began working for defendant Draper City ("Draper") as a police officer in October of 2006.[1] The plaintiff was subsequently terminated from his employment. The plaintiff's Complaint seeks declaratory judgment that at the time of his termination, he had progressed from probationary employment status to a permanent employee entitled to a pre-termination hearing.

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[1] While the precise date of employment is in dispute, this does not constitute a material dispute.

Along with its Motion for Summary Judgment, Draper has submitted the Affidavit of Mac Connole who is the Police Chief for Draper. Chief Connole attests that "[p]ersons who are hired as police officers with the City of Draper are in a probationary status for one year." (Connole Affidavit at para. 5). He further attests that the plaintiff had been informed that due to "job performance issues, his probationary status was being extended an additional six months." (Connole Affidavit at para. 6)

Draper has also submitted the Affidavit of Russell L. Adair, a Lieutenant in the City of Draper Police Department. Lieutenant Adair attests that he met with the plaintiff "[d]uring the week of September 23, 2007," and informed him that "due to performance issues the City was extending his probation an additional six months." (Adair Affidavit at para. 3).

Attached as Exhibit M to the plaintiff's Supporting Memorandum is an email from Lieutenant Adair to the Human Resources Department discussing the extension of the plaintiff's probationary status. Also attached, as Exhibit K, is a Performance Evaluation Report, indicating that the plaintiff's probationary status was scheduled to end in October, but recommending an extension of the probationary period. The plaintiff and his supervising officer both signed this Report. A number of other Exhibits attached to the Supporting Memorandum further reference the plaintiff's continuing status as a probationary employee.

It appears that in February of 2008, a Human Resources Officer named Hazel Dunsmore prepared a Personal Action Form ("PAF") to approve a salary change for the plaintiff. Ms. Dunsmore has submitted her Affidavit, attesting that in preparing the PAF from a template she "made a clerical error and did not change the Employee Job Status from Permanent to Probationary." (Dunsmore Affidavit at para. 4). Ms. Dunsmore further attests that she "had not checked [the plaintiff's] personnel file to determine whether his job status was Permanent or Probationary." Id.

In its Motion for Summary Judgment, Draper argues that it considered the plaintiff to be a probationary employee at the time of his termination and that Ms. Dunsmore's clerical error in preparing the PAF did not result in an actual change of the plaintiff's employment status from probationary to permanent.

In Opposition, the plaintiff maintains that Draper's own internal policies and procedures mandated that he be provided written notice of his probationary status being extended. The plaintiff argues that in the absence of such notice, this Court "must hold that plaintiff became a full time non-probationary employee" and was therefore entitled to a pre-termination hearing with right to appeal.

After considering the parties' positions, the Court determines that based on the undisputed facts and the numerous uncontroverted documents submitted by Draper, the plaintiff was clearly made aware and provided

notice of his superior's intent to extend his probationary status because of concerns with his job performance. This intent was conveyed to the Human Resources Department and was reflected in a performance evaluation which the plaintiff acknowledged by signing.

Further, the Court is not persuaded that the single PAF, which the plaintiff relies on, and which was clearly the result of a clerical error, provides any evidence that he was in fact a permanent instead of probationary employee. Indeed, there is no dispute that Ms. Dunsmore had no authority to change the plaintiff's job status, that she was merely working from a template and that she had not checked the personnel file to verify that in fact his status was that of a probationary employee. The Court agrees that it would be inequitable and unlawful for the plaintiff to elevate his employment status based on Ms. Dunsmore's inadvertent error. The legal authorities cited by Draper in its moving papers support this conclusion.

Accordingly, the Court determines that there are no genuine issues of material fact and that Draper is entitled to Summary Judgment as a matter of law. The Court therefore grants Draper's Motion for Summary Judgment.

This Memorandum Decision will stand as the Order of the Court.

Dated this 5 day of February, 2010.

/S/

WILLIAM W. BARRETT
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 5 day of February, 2010:

Jerrald D. Conder
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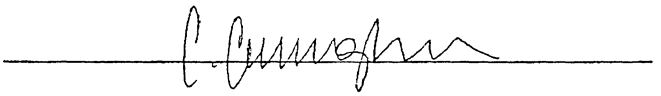

Rules 7(c)(3)(A) and (B) of the Utah Rules of Civil Procedure

Utah R. of Civ. Proc. 7(c)(3)(A):

A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

Utah R. of Civ. Proc. 7(c)(3)(B):

A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

Section 1010 of the Draper City Personnel Manual

Section 1010 – INTRODUCTION TO THE MANUAL

General Policy Statement:

Our employees are our most valuable resource. Therefore, this manual was written to provide a framework to guide Department Heads' actions and to inform employees of their rights and responsibilities.

Guidelines:

1. Purpose of the Personnel Policies and Procedures Manual. The manual is the City's guide and general summary of Human Resource policies. Through the manual we hope to provide an understanding of City philosophy and interests, promote consistency and fairness in employee/employer relationships, enhance employee performance, and protect City legal interests.

2. General Guidelines. The manual contains general information and guidelines. It is not intended to be comprehensive or to deal with all possible applications and detailed specifics of City policies and procedures. Some policies outlined here (such as Benefit and Retirement Plans) are described in other official documents not included in this manual. These documents are controlling and should be reviewed when specific questions arise.

3. City's Right to Modify or Discontinue Policies. Our business environment changes frequently and quickly. The City reserves the right to unilaterally alter, amend, except or revoke any policy, practice or procedure set forth herein in its sole discretion. All amendments shall be adopted by resolution of the City Council.

4. Department Head Responsibilities. It is important that Department Heads review the manual, become familiar with its policies, ask questions, and utilize it as may be appropriate. Our goal is that these policies will promote sound management practices and the success of each member of our organization. This manual is Draper City property and is intended for use as a reference inside our organization.

5. Employees' Acknowledgment. All City employees are responsible to be aware of and adhere to all the provisions of this manual and the policies and procedures set forth herein and any amendments hereto. Each employee shall sign and submit to the City an Acknowledgment Form, as provided by the City, attesting to the fact that he or she has had an opportunity to read and understand the provisions set forth herein. The copy of the Personnel Manual shall be available in each Department and on the City's Network System.

6. Disclaimer. The information contained herein and any amendments or alterations hereto do not constitute a contract or agreement of any kind between the City and its employees. No person other than the City Manager, with the advice and consent of the City Council, shall enter into an employment agreement with any person inconsistent with the provisions herein. The information and policies contained herein shall not constitute or create any rights in or obligations to any persons or parties other than to the City and its employees. Nothing herein shall be construed to limit the City's right to discharge an employee or to create any other obligation or liability on the City.

7. City Manager Delegation Authority. Except as otherwise required by law or as directed by the City Council, the City Manager shall perform the administrative duties and responsibilities of the City regarding personnel matters and the administration of the policies contained herein. Except in the case of appointments, hiring, promotions, transfers, reclassifications, suspensions or dismissals, the City Manager may delegate such administrative duties and responsibilities to Department Heads or other designees as deemed appropriate and permitted by law.